

Session 5

Legal Parties & Their Rights in State Court

Tribal Court Jurisdiction

Transfer of CINA Case to Tribal Court

Session 5

- Legal parties and their rights under state law
- Additional rights of parties under ICWA
 - Indian Child, Indian Child's Tribe, Parents, Indian Custodian
- Tribal Court Jurisdiction
- Transfer of CINA case to Tribal Court

Legal Parties in an ICWA CINA Case

- Indian Child
- Indian Child's Tribe which has intervened
- Parent
- Indian Custodian who has intervened
- Department of Health and Social Services
- Guardian ad litem
- Other Intervenor

Legal Rights in General

- Notice of hearings
- Opportunity to be heard
- Representation by attorney or other
- Right to participate also includes:
 - Receive information about the case, including copies of OCS files
 - File motions
 - Question witnesses, testify
 - Appeals

Indian Child's Rights

- Scope of notice/opportunity to be heard
- Appointment of GAL to advocate best interests
- Appointment of attorney to represent expressed interests in some situations
- Remain home unless removal standards are met
- Placement within preferences
- Receive Active efforts
- Petition to invalidate CINA proceedings

Indian Child's Tribe

- Definition of “Indian child's tribe”
 - Tribe in which child is member or eligible
 - If more than one Tribe, Tribe with which child has more significant contacts
- Procedure to follow if more than one Tribe
 - Give Tribes chance to determine which Tribe should be designated as Indian child's Tribe
 - If disagreement, court determines more significant contacts
- Other Tribe may be permitted to intervene

Indian Child's Tribe's Rights

- Notice of proceedings
- Intervene as legal party at any stage
 - Same rights as other legal parties
 - Extra time to prepare for court hearings
 - Review records
 - Representation by non-attorney designee
- Even if no intervention, right to receive notice of permanency hearing, extension of custody, and termination of parental rights petition

Continued on next slide...

Indian Child's Tribe's Rights (cont'd)

Under ICWA the Indian child's Tribe also has the right to:

- Petition the state court to transfer the CINA case to Tribal Court
- Determine who is considered an “extended family member”
- License, approve, or specify a foster home if child not placed with extended family member
- Establish a difference placement preference order

Role of Intervening Indian Child's Tribe in CINA Case

- Advocate for Tribe's interest and position with regard to child in court, administrative reviews, meetings
- Additional contributions can include:
 - Identifying and providing information about potential placements
 - Monitoring/supporting caregivers
 - Providing information about Tribe's cultural standards and practices
 - Making sure services are culturally appropriate
 - Making sure children are connected to their culture

Parents

Definition:

- Biological parent of an Indian child; or
- Indian person who has adopted an Indian child, including under Tribal law or custom
- Does **not** include the unwed father where paternity has not been acknowledged or established

Parents' Rights

- Notice, opportunity to be heard
- Extra time to prepare
- Right to court-appointed attorney if indigent
- Removal findings
- Active efforts
- Request transfer of jurisdiction to Tribal Court
- Right to prevent transfer to Tribal Court
- Petition to invalidate CINA proceedings

Indian Custodian

Definition

- An Indian person who has legal custody of an Indian child under tribal law or custom or state law; or
- An Indian person to whom temporary care, custody or control has been transferred by the parent

Indian Custodian's Rights

An Indian custodian has the right to:

- Intervene as legal party
- Receive notice of proceedings, ability to participate
- Attorney appointment at public expense if indigent
- Request transfer jurisdiction to Tribal Court
- Petition to invalidate CINA proceedings

Indian Custodian: Settled Legal Issues

- Status has to occur before legal custody assumed
 - Parent can't confer status after child in state custody
 - State's placement does not create Indian custodianship
- Indian custodians to whom temporary custody was transferred can lose status in some situations:
 - Parents can revoke status prior to state taking custody by reassuming care
 - After custody is taken, state and parent together can revoke status
 - Custodianship ends if person is incarcerated for child's entire minority

Indian Custodian: Unsettled Issues

Can Indian custodian status be created by one parent?

Can parents **and** Indian custodian be legal parties, or does the Indian custodian stand in the shoes of the parent?

Can parent revoke Indian custodianship over objection of OCS?

How is an Indian custodianship based on tribal law or custom terminated?

Is termination necessary to end the Indian custodian's rights?

Is the Indian custodian entitled to active efforts if parents seek reunification?

Status of Indian custodian if parents' rights terminated?

Tribal Court Jurisdiction

- Alaska Supreme Court line of cases recognizing Tribal Court jurisdiction:
 - 1999: Custody disputes between parents
 - 2001: Transfer of CINA proceedings
 - 2011: Original jurisdiction in child protection cases
 - 2014: Appeals to Tribal Court prior to State court
 - 2016: Enforcement of Tribal Court child support orders
 - 2020: Full Faith & Credit of Tribal Court Orders
- State court enforcement of Tribal Court custody orders in child custody proceedings

Transfer to Tribal Court

- Tribe, parent or Indian custodian may request to transfer CINA case to Tribal Court
- Request may be made orally on the record or in writing at any stage of the proceedings
- Request will be granted unless:
 - A parent objects;
 - The Tribe declines jurisdiction; or
 - The court determines “good cause” not to transfer

Continued on next slide...

Transfer to Tribal Court (cont'd)

- “Good cause” – court must NOT consider:
 1. Advanced stage of proceedings if notice not provided until advanced stage
 2. Prior proceedings with no transfer
 3. Whether transfer may affect placement
 4. Child’s cultural connection with Tribe
 5. Negative perception of tribal systems
- If case transferred:
 - State court records transferred to tribal court
 - State court work with Tribal Court for smooth transition
 - State court CINA case (and appointments) dismissed